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Supreme Court of the United States

October Term, 1964

No. 71

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

DARLINGTON MANUFACTURING COMPANY, DEERING MILLIKEN COMPANY, INC., DEERING, MILLIKEN AND COMPANY, INC., and TEXTILE WORKERS UNION OF AMERICA, AFL-CIO.

No. 37

TEXTILE WORKERS UNION OF AMERICA,
Petitioner,

v.

DARLINGTON MANUFACTURING COMPANY, DEERING MILLIKEN COMPANY, INC., DEERING, MILLIKEN AND COMPANY, INC., and NATIONAL LABOR RELATIONS BOARD.

BRIEF OF DARLINGTON MANUFACTURING COMPANY IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1963

No. 874

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

DARLINGTON MANUFACTURING COMPANY, DEERING MILLIKEN COMPANY, INC., DEERING, MILLIKEN AND COMPANY, INC., and TEXTILE WORKERS UNION OF AMERICA, AFL-CIO.

No. 846

TEXTILE WORKERS UNION OF AMERICA,
Petitioner,

v.

DARLINGTON MANUFACTURING COMPANY, DEERING MILLIKEN COMPANY, INC., DEERING, MILLIKEN AND COMPANY, INC., and NATIONAL LABOR RELATIONS BOARD.

BRIEF OF DARLINGTON MANUFACTURING COMPANY IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

Jurisdiction

Upon the statement of the Solicitor General that the Chief Justice timely extended the time for filing the Board's Petition in No. 874, it is conceded that the jurisdictional requisites are adequately set forth in that Petition.

However, the Petition of the Union in No. 846 was untimely and therefore the jurisdictional requisites are lacking in that Petition. The Union's Petition was filed ninety-four days after the decision of the court below. 28 U. S. C. 2101(c), and Rule 22(3) of this Court. Cf. Memorandum of Board in *Local 3* v. *NLRB* (No. 700, October Term, 1960), cert. den. 365 U. S. 845. As the Union in No. 846 has failed to apply for a writ of certiorari within the prescribed time, and, as the period for applying for a writ of certiorari was not extended by a Justice of this Court, its application should be denied.

Statement

The decision of the court below that the permanent and total discontinuance of Darlington's only plant was not an unfair labor practice was clearly correct and presents no questions cognizable under Rule 19 of the Rules of this Court, it does not conflict in any manner with the decision of any court of appeals, and it does not present any important question of federal law. In order to demonstrate that the decision below turns upon its own particular facts and that it can affect only a few others than the Union and this respondent, it is necessary to set forth some essential facts which have been omitted in both petitions.

Respondent Darlington was chartered in 1883 under the laws of South Carolina, and operated in the town of Darlington a cotton goods plant that had been built prior to 1900. Its peak employment was 550 production employees. It did not own or operate any other plant. During the depression years of the 1930's it lost considerable sums of money and was in constant debt to its selling agent, Deering, Milliken & Co., Inc. In 1937, Darlington was put through bankruptcy in a Section 77B proceeding and Deering Milliken, Inc., then acquired approximately 41% of the common stock of Darlington in satisfaction of its debt. At the time of

Darlington's liquidation in October 1956, its 150,000 shares were owned by:

Deering Milliken & Co., Inc.	41.4%
Cotwool Manufacturing Corp.	18.3
Roger Milliken and members of his immediate family	6.4
Directors and employees of Deering Milliken & Co.	2.9
Outsiders or non-Milliken family or interests (about 100 stockholders living in South Carolina, 50 in New York, and more than 50 scattered over the United States)	31.0
	100.0%

Darlington earned a small amount of money in each year during World War II. From 1952 through 1956 it earned comparatively little, experiencing for those years a return of only 2.8% on its average invested capital, a percentage which was considerably lower than that experienced by its competitors.

A Board-ordered election was held on 6 September 1956 at which time 258 votes were cast for the Union, and 252 votes against it. On 11 September, Darlington filed objections to the election.

Factors Causing Call of Directors' Meeting

On 7 September the results of the election were telephoned by long distance to Roger Milliken, president of Darlington, by James M. Oeland, its "chief active or operating executive" (J.A. 120). Milliken then reviewed the entire Darlington situation from the standpoint of its future possibilities of making a profit. He considered the loss of Darlington's traditional market for its cloth with the consequent necessity of entering into the highly competitive standard print cloth constructions; the import-export prob-

lem; the prevailing low market prices for its goods which would project a loss of $250,000 for the ensuing year unless there was an upward change; the necessity to air condition the plant at a cost of $800,000; and the belief that the minority employee resistance group had now become a majority which would prevent management from going ahead with the work assignment changes and its modernization program. Milliken thereupon called the directors who lived out of the state and reviewed with them the foregoing adverse factors facing the company and they all agreed that a directors' meeting should be held as soon as possible.

Board of Directors' Meeting on 12 September

The board of directors met on 12 September pursuant to the call of the president and was attended by all seven directors. The directors reviewed the economic factors facing Darlington:

Profit performance. Oeland reported to them that he estimated the results for the 1956 fiscal year ending in November "would show a loss of $40,000, the first loss since the 1930's" (J.A. 427). The ratio of Darlington's earnings to its invested capital during the preceding five years had been:

1952	1½%
1953	8%
1954	2%
1955	3%
1956	.6% [1]

[1] The projected loss of $40,000 was based on orders that Darlington had taken at the lower prices prevailing in May-July and on the price of cotton purchased and the labor cost per pound. The subsequent decision by the stockholders to liquidate the corporation resulted in certain transactions such as the sale of goods, materials, etc., which converted this projected loss into an actual profit for 1956 of $27,160.49. If the plant had not been liquidated and the projected loss of $40,000 for 1956 actually realized, the ratio of earnings to invested capital for that year would have amounted to a red percentage of 1%.

Darlington's 2.8% ratio average for these five years compared with an 8% ratio for its competitors in the textile industry.

Loss of traditional markets. In the early 1950's, which were its profitable years, Darlington specialized in producing "fancies" but by mid-1956 this business had almost entirely disappeared, and in order to stay in business it had become necessary to enter the field of standard print cloth constructions, or "staples," a field where it had to compete with the largest and most efficient mills in the textile industry which were making these kinds of products in tremendous volume at costs considerably below those of Darlington.

Foreign imports and exports. The adverse effect of Japanese cottons imported into the United States beginning in 1954 and surging upward in 1955 became, and continues to be, a national issue and was a very real problem to Darlington in 1956. Also, the export market for United States textiles had progressively deteriorated.

Low market price for its products. From January to September 1956 there had been a serious downward trend of print cloth prices, without a corresponding decrease in the price of raw materials or manufacturing costs. This decline in prices amounted to approximately a cent a pound for the first six months of 1956, the mill margin per pound having dropped from about 37¢ in January 1956, to approximately 31¢ in September. The break-even point for Darlington, reached in the early months of 1956, was about 34¢ per pound. Hence a drop of 1¢ per pound in the mill margin, at Darlington's annual rate of approximately 8,000,000 pounds of production, meant a decrease in Darlington's gross revenues of $80,000; and if the drop was 3¢ per pound for a full 12 months' period it would result in a decrease in Darlington's gross income of $240,000 a year.

High manufacturing costs. In mid-1955 Darlington engaged an independent textile engineering firm to make a survey of the plant's operations relative to its efficiency,

costs of operations, etc. The report confirmed the fact that Darlington was not competitive, and recommended that certain steps be taken to increase the efficiency of the plant but these were not placed into effect because of the physical condition of the old building.

Future cost of improvement-modernization program. Although considerable expenditures had been made prior to 1956 in an effort to modernize the plant, yet it was pointed out at the directors' meeting that, among other needs, the plant should be air conditioned at a cost of $800,000; additional high-speed looms should be purchased at a cost of $1,500 each; and additional building space for these looms should be constructed at a cost of $400,000.

Mill failures in the textile industry. The directors were aware of the high attrition in the industry, knowing that in the twelve months prior to 30 June 1956, 400,000 spindles had been liquidated, or the equivalent of approximately nine mills of the size of Darlington.

Increased costs upon advent of Union. The Union's literature and promises to the employees were designed to further aggravate the economic plight of Darlington. For example, the Union's letter to the employees in September 1956 states that they "need to do something about changing" the work load adjustment system, which they term the "s-t-r-e-t-c-h o-u-t," and that a vote for the Union in the election "will be the first big step towards changing it. We don't need to tolerate these conditions any longer * * * just keep thinking about the s-t-r-e-t-c-h o-u-t and the need for higher wages." Attached to the letter were printed posters of the Union stating that a vote for the Union is a vote for: higher wages, company-paid pensions, better insurance plan, more paid holidays, and better vacations. At the hearing, the Trial Examiner questioned Milliken as to whether Darlington regarded the Union organization of the plant as an economic factor to be considered by the directors, and he answered that "it meant to me and to the other

directors that we could expect increased resistance to the cost cutting" (JA 477).

Following a discussion and a thorough review of *all* the foregoing adverse economic factors confronting their company, a resolution was unanimously adopted by the directors authorizing the calling of a meeting of the stockholders to vote upon a recommendation that Darlington liquidate its business. The directors instructed Oeland to run a public notice of the call of the stockholders' meeting for 17 October in the Darlington newspapers, and "to keep the plant status quo for the final decision of the stockholders." The plant was operated during this period on a full schedule of hours worked and no employees were laid off or discharged. The Solicitor General paints a lurid picture of statements allegedly made by minor supervisors to some employees *after* the board of directors had recommended to the stockholders that the corporation be liquidated. While the Trial Examiner credited these statements, he expressly found that "they are not shown to have reflected any declaration by Milliken" (JA 66). None of the statements were made by officers or directors of Darlington. Some were made due to concern over the impending loss of their own jobs (JA 482), and they were expressions of personal opinion unauthorized by management.

Stockholders' Meeting on 17 October

There were 217 stockholders of Darlington. Approximately 100 of these lived in South Carolina, 50 in New York, and the remainder were scattered over the United States. One hundred and fifty of these stockholders were represented in person or by proxy at the meeting on 17 October in Darlington. Of a total of 150,000 outstanding shares, 9,357 shares were represented in person, and 129,328 shares by proxy.

Roger Milliken opened the stockholders' meeting with a reading of a statement which was phrased largely in terms of the likely economic difficulties with which the com-

pany would be beset if it continued in business (JA 267). This statement pointed out to the stockholders "that they might well take their funds out of Darlington and reinvest them in tax exempt bonds which would give them a higher return on their investment without any risk". Milliken presented the directors' recommendation to liquidate and commented on the factors that led to the recommendation. Following the report and a discussion, a resolution was adopted providing for the liquidation and dissolution of Darlington immediately after the present goods in process were fully processed and authorizing the directors to sell at auction all of the physical assets and properties of the company. The resolution was adopted by the favorable vote of 134,911 shares, and 3,774 shares were voted against the resolution.

Decisions of the Board and the Court Below

Insofar as the Section 8(a)(3) charge is involved, the Board noted in its decision that Darlington advanced two defenses. One, "it claimed that the shutdown of its mill was due to economic and financial factors" (JA 7). The second, that "it had an absolute right 'to go out of business for whatever reason it may choose, and regardless of whether union animosity may have contributed to the decision'" (JA 7). As to the first defense, the Board predicated its decision upon a dubious ruling of law, viz.:

> "Moreover, even assuming, as the Respondent contends, that the 6 genuine economic factors as well as the employees' union activities were responsible for the closing of the mill, Darlington's action was no less unlawful. A plant shutdown resulting in the discharge of employees that is partly due to employees' union activities constitutes an unfair labor practice". (JA 9).

In overruling the second defense, the Board held that "§ 8(a)(3) literally proscribes Darlington's closing of its business in retaliation for the employees' selection of the Union as their bargaining representative", and "in addi-

tion, Darlington's conduct was contrary to the fundamental spirit and purpose of the Statute" (JA 16). It is Darlington's position that the Board was not justified in liberally and loosely interpreting the Act so as to place the substantial onus on Darlington of either staying in business against the best judgment of all its directors and more than ninety-three per cent of its shareholders, or paying back pay until the last cent of their investment in the enterprise was expended. In any event, the entire thrust of the Board's approach to the Section 8(a)(3) charge was directed to the defenses of Darlington as the sole employer. The Board only placed minor reliance upon the single employer argument which is now the basis for the questions presented by the Union and the Board in their respective petitions.

Member Rodgers filed a dissenting opinion, being of the view that Darlington had not "violated the Act by liquidating its plant and going out of business." He was of the opinion that there was nothing contained in the Act "which limits an employer's right to go out of business at such time and under such circumstances as he chooses" (JA 36). Member Rodgers set forth in his opinion some of the legislative history of the Act to indicate that "Congress gave no serious consideration to the limiting of so fundamental a right as the employer's right to go out of business." He quoted from Senator Walsh, Chairman of the Senate Labor Committee, during the debate on the Wagner Act:

> "Mr. President, there are some fundamental rights an employer has, just as there are rights an employee has. *No one can compel an employer to keep his factory open.* • • •
>
> • • •
>
> "*No one can keep an employer from closing down his factory and* putting thousands of men and women on the street. • • • " (JA 36-7)

Board Member Leedom (formerly its Chairman) filed a concurring and dissenting opinion in which he found, in agreement with the Trial Examiner, that Darlington and Deering-Milliken did not occupy a single-employer status and therefore the sole issue was whether Darlington alone engaged in the alleged unfair labor practices. Member Leedom also dissented from the majority with respect to the back pay remedy, being of the opinion that back pay should be awarded only from the date of the discrimination to the date when the plant closed (J.A. 34).

On 15 November 1963 the Court of Appeals for the Fourth Circuit denied enforcement of the Board's order, 325 F. 2d 682. The majority held that the decision by the stockholders of Darlington to close the plant was not an unfair labor practice. In so concluding, the court accepted *arguendo* the contention of the Board that the "substantial economic reasons warranting the determination to close the plant" disclosed by the evidence and discussed in the preceding pages of this brief "were not acted upon," and it assumed with the Board, "again arguendo," that, even if they were acted upon, if unionization played any part in the decision to close the plant, then it might be considered as responsible for the decision (325 F. 2d at 685). The court held that "to go out of business in toto, or to discontinue it in part, permanently at any time, we think was Darlington's absolute prerogative" (p. 685). Having decided that there was no violation of the Act by Darlington, it was unnecessary to pass upon the issue of projected liability through single-employer status: "Our decision that Darlington is without liability, of course, bars such expansion of responsibility" upon Deering Milliken (p. 687).

Argument

To focus attention on precisely what is offered as an issue for Supreme Court determination, it is important to keep in mind that both the Union and the Board urge that the legal conclusion of the majority of the Board was cor-

rect, and that the legal conclusion of the majority of the court below was in error, as to whether Darlington violated Section 8(a)(3) of the Act by closing its only plant and permanently terminating its business. The complaint was originally issued solely against Darlington charging it with a violation of Section 8(a)(3) (J.A. 49), and the Trial Examiner begins the Intermediate Report with the statement that "With the closing of the mill, the salient issue in this case is whether such closing and the discharge of employees was discriminatory in violation of Section 8(a)(3) of the National Labor Relations Act" (J.A. 44). The majority of the Board agreed with such a view of the principal issue involved, saying: "One of the major issues in this case was raised by Darlington's contention that, as an employer, it had an absolute right 'to go out of business for whatever reason it may choose, and regardless of whether union animosity may have contributed to the decision' " (J.A. 7); and "At this point we reach the fundamental issue noted above—whether an employer has the absolute right to go out of business even if its reason for doing so is its employees' union activities" (J.A. 9-10); and, "We find, in conclusion, and for the foregoing reasons that Darlington's closing of the mill, with its concomitant discharge of employees violated Section 8(a)(3) and (1) of the Act" (J.A. 18). Member Rodgers dissented from this conclusion, and posed the determinative issue as follows: "The question to be resolved with respect to Darlington is the important and fundamental question of whether or not Darlington violated the Act by liquidating its plant and going out of business. My colleagues have found that such a going out of business constitutes a violation of law which must be remedied by this Board. I do not agree" (J.A. 36).

The Board petitioned the Court of Appeals to enforce the Order which had found that Darlington as a single entity had violated Section 8(a)(3). In the court below the Board devoted 34 pages of its brief to its argument that Darlington had violated Section 8(a)(3) by permanently closing its plant, and thereafter dealt with its "Questions

Involved" number 4, viz., "Whether the Board properly found that the Deering Milliken corporations and its affiliated corporations occupy a single-employer status with Darlington, and are responsible for the unfair labor practices found."

The majority of the court below agreed with Darlington's view of the law as applied to the facts of this record, thereby accepting the view of the dissenting member of the Board. It said, "our decision that Darlington is without liability, of course, bars such expansion of responsibility [upon Deering-Milliken under the doctrine of single-employer liability]." 325 F. 2d at 687.

The issue in the present case is uniquely narrow, and no amount of "horribles" suggested by petitioner Union (Pet. in pp. 14-17), and no amount of reframing of the basic question involved as suggested by petitioner Board (Pet. p. 2), can convert it into one warranting review by this Court on certiorari. This Court is properly concerned only with the limited issue of whether Darlington, upon the record, had the right to permanently close its only plant and completely go out of business.

The decision does not in any sense broadly carve an exception out of the Act as argued by the Union in its petition (No. 846, p. 16), nor is "the problem so acute" as envisaged by the Board (No. 874, p. 14). Such arguments bear no relationship to the carefully worded and limited opinion of the Court of Appeals. The Court expressly limited its rulings (325 F. 2d at 685):

> "Of course, the right of discontinuance which we here uphold, means an actual, unfeigned and permanent end of operations—not a removal, nor subcontract, nor a change merely in the form of the corporate entity. No ruse or subterfuge is suggested here. Darlington's was an absolute desistence, not a temporary intermission . . ."

In their zeal to obtain review before this Court, petitioners have asked the Court to review a decision never rendered.

The decision of the court below as to Darlington was not predicated upon a disagreement or agreement with the Board over any facts. "Our opinion is that the decision to close the plant was not an unfair labor practice. In this we accept the findings of fact made by the Board". 325 F. 2d at 685. The court went on to record that even though "the evidence discloses substantial economic reasons warranting the determination to close the plant without reference to the entry of the Union into the plant, we accede arguendo to the contention of the Board that these reasons were not acted upon".

Nor was the Board's so-called "expertise" involved in the decision of the court below. The review of the Section 8(a)(3) determination of the Board involved the same degree of judgment by the court as by the administrative body. The court below was as fully equipped to pass upon the fundamental rights of Darlington to terminate its business operations as was the Board.

I.

The Decision of the Court Below Denying Enforcement of the Board Orders on the Ground that Darlington's Permanent and Total Discontinuance of Business Was Not an Unfair Labor Practice Was Clearly Correct and Presents No Questions Cognizable under Rule 19 of the Rules of This Court.

The court of appeals was clearly correct in its decision of the basic question that was presented to it and that it did decide. The court's decision was that it was Darlington's absolute prerogative to discontinue its business—to make "an actual, unfeigned and permanent end of operations" (325 F. 2d at 685).

The Board does not present this question for review by this Court and even opposes review of the question at page

three of its memorandum in response to the Union's petition.

The majority of the court below arrived at its conclusion by the judicial view that the "fundamental purpose of the National Labor Relations Act is to preserve and protect the rights of both industry and labor so long as they are in the relationship of employer and employee", and by a resort to the reasoning of many decisions handed down by the courts of appeals. 325 F. 2d at 685-6. In contrast, the Board seems to read into the Act a supervening obligation upon Darlington to remain in business, once the Union entered the scene, or a kind of suspension of the power of alienation, denying to the employer-owner of the business the right to dispose of his property, and to terminate his status as an employer if a Union is demanding bargaining rights. But the legislative history of the Act as set forth in the opinion of dissenting Member Rodgers completely refutes this reading of the Act (JA 36).[2] The right of Darlington to close its plant was recognized by this Court in *Southport Petroleum Co.* v. *NLRB*, 315 U. S. 100, 106 (1942), with Justice Jackson saying, "Whether there was a *bona fide* discontinuance and a true change of ownership—which would terminate the duty of reinstatement" was a question of fact determinable by the Board or the Court on contempt proceedings.

The Board and the Union in their petitions for a writ of certiorari unwarrantedly attempt to treat the ruling of the court below as enunciating a general rule that under all circumstances an employer may close one department, or one of its several plants, without thereby violating the Act where the purpose was to avoid dealing with the Union.

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[2] It is significant that neither the majority decision of the Board nor the dissenting opinion of the court below refer to any legislative history of the Act to support their conclusion. Nor did the Board or the Union cite any legislative history in their briefs.

When the opinion is considered in its entirety, it is abundantly clear that the court below limited its ruling to the right of Darlington alone to close its only plant and completely go out of business, and this was manifestly correct. "In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason". *Helvering* v. *Goweran*, 302 U. S. 238, 245 (1937).

Pertinent to a consideration of the instant petitions is the statement by Mr. Justice Frankfurter, speaking for a unanimous court, in *NLRB* v. *Pittsburgh S. S. Company*, 340 U. S. 498, 502 (1951):

> "Were we called upon to pass on the Board's conclusions in the first instance or to make an independent review of the review by the Court of Appeals, we might well support the Board's conclusion and reject that of the court below. But Congress has charged the Courts of Appeals and not this Court with the normal and primary responsibility for granting or denying enforcement of Labor Board orders. 'The jurisdiction of the court [of appeals] shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review * * * by the Supreme Court of the United States upon writ of certiorari. * * * ' Taft-Hartley Act § 10(e), 61 Stat 148, eh 120, 29 USC (Supp III) § 160(e). Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.' * * * "

II.

There Is No Conflict of Decision.

The Board asserts in its petition (p. 15) that the decision of the court below sustaining the employer's right permanently close its plant and go out of business "conflicts in principle with the decision" of the Eight and Second Circuits.[3] The Solicitor General candidly adds that it is "possible to distinguish these cases as involving the abandonment of a mere phase of a single operation in contrast to the closing of a separately incorporated plant, geographically segregated from the employer's other operations" (p. 16). Hence, there has not been cited any real conflict in decisions.

Rather, the Board expressly recognized in its decision in October 1962 that "there is no decided case dispositive of Darlington's claim that it had an absolute right to close its mill, irrespective of motive" (JA 15). Decisions of courts of appeals that have been handed down subsequent to October 1962 do not raise any conflict in principle with the decision of the court below but rather confirm and strengthen same. See, *NLRB* v. *New England Web, Inc.*, 309 F. 2d 696 (1 Cir., 1962); and *NLRB* v. *Kingsford*, 313 F. 2d 826 (6 Cir., 1963).[4]

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[3] *National Labor Relations Board* v. *Missouri Transit Company*, 250 F. 2d 261 (8 Cir.), and *National Labor Relations Board* v. *Savoy Laundry, Inc.*, No. 28119 (C. A. 2), decided January 24, 1964.

[4] The Board stated subsequent to its decision in the instant case: "we respectfully disagree with two circuit court decisions, *N.L.R.B.* v. *Rapid Bindery, Inc.*, 293 F. 2d 170 (C. A. 2), and *N.L.R.B.* v. *J. M. Lassing, d/b/a Consumers Gasoline Stations*, 284 F. 2d 781 (C. A. 6), cert. denied 366 U. S. 909. Those cases held in effect that a respondent employer does not violate Section 8(a)(3) by accelerating the termination of its business or the moving of its plant because of the advent of a union." *Myers Ceramic Products Co.*, 140 N.L.R.B. 232, 234 (December 1962).

III.

There Is No Important Question of Federal Law.

The Board argues in its petition that this Court is here presented an important question in the administration of the Labor Act, stating that the decision has evoked wide interest and comment (pp. 16-17). Perhaps there would be validity to this argument if the underlying question were the one that the petitioners seek to present to this Court, namely, whether an employer may permanently discontinue a department or a division, or a part only of its business operations in order to avoid dealing with the Union. As shown, however, this is not the question properly presented and decided by the court below. The mere assumption of principles of law, or the mere listing of remote possible analogies, do not make an important federal question. The interjection of different possibilities of application of the labor law to other factual situations does not convert a correct decision into an important question of federal law.

Strangely, there is no citation to any pending litigation, no indication that in the almost year and a half time since the Board's decision was entered in this case have similar problems arisen, and no contention that in the cases pending before the Board is there involved any similar problem. Rather, the decision of the Board has been cited by the majority in only two subsequent Board decisions and in no court opinions; nor has the decision of the court below been cited in any subsequent court or Board decision.[5] This situation is in sharp contrast with the ruling of the Board in *Fibreboard Paper Products Corp.* v. *National Labor Relations Board,* 138 NLRB 550, enf. 322 F. 2d 411, certiorari granted, 375 U. S. 963,[6] which deals with

[5] Shepard's Federal Labor Law Citations, Volume V, No. 4, March 1964 issue.

[6] Decision cited eight times in subsequent Board decisions, and in two decisions by courts of appeals.

the extent of the employer's duty to bargain concerning a projected curtailment of operations or the abandonment of a business for economic reasons through subcontracting of work.

In summary, the decision below accords with a sound application of the Act. There is no conflict of circuits, but rather the decision accords with principles articulated by many circuits. There is no persuasive reason why certiorari should be granted.

CONCLUSION

For the foregoing reasons respondent Darlington Manufacturing Company prays that the writs of certiorari should be denied.

Respectfully submitted,

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27 March 1964